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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 288

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., AND EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, AS AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, AND EUGENE M. PRATT, AS STATE'S ATTORNEY OF THE COUNTY OF PEORIA, STATE OF ILLINOIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM.

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In view of the provisions of Rule 16(1) of this Court, it is apparent that the appellees should have filed a motion to dismiss the appeal, since the appeal is from a state court. A motion to affirm lies only when the appeal is from a federal court. However, assuming that the Court will treat the appellees' motion to affirm as a motion to dismiss, the appellants will now proceed to answer the points made in the appellees' motion.

ARGUMENT.

The appellees contend on page 2 of their motion that in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220 (1949), this Court recognized that "ante mortem contracts for funeral merchandise to be delivered at death are inherently so liable to abuse and so likely to result in imposition as to render constitutional legislation regulating or prohibiting such contracts." The appellees, however, read too much into that case, for it does not support such a proposition. Moreover, the case is distinguishable on its facts.

The *Daniel* case involved a South Carolina statute prohibiting undertakers from serving as agents for life insurance companies. Most of the agents of the insurance company which challenged the statute were undertakers, and the insurance contract which the company sold contemplated use of the policy's proceeds to pay funeral expenses. A "facility of payment" clause might justify payment of proceeds to an undertaker for the insured's funeral. The Court concluded that it could not say that South Carolina was not entitled to call the funeral insurance business an evil. In support thereof it mentioned the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money would buy, whether or not an expensive ceremony was consistent with the needs of the survivors. There was also the likelihood of overreach on the part of the insurance companies, and the possibility of monopoly control.

Thus, contrary to the appellees' contention, the *Daniel* case did not involve pre-need contracts for sale of funeral merchandise to be delivered at death. Moreover, such pre-need contracts protect the purchaser against the evils at

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which the South Carolina statute was directed. A person who purchases funeral merchandise under a pre-need contract knows what he wants and how much he is willing to pay for it. The sale is transacted in a calm and dispassionate setting. On the other hand, in the case of the purchase of funeral merchandise and services at the time of death, the undertaker usually makes the sale to a bereaved purchaser under circumstances of great emotional stress. Where the undertaker is also the insurance agent, a real possibility of imposition exists, since the undertaker will attempt to make a sale involving the entire proceeds of the insurance policy.

This Court properly held in the *Daniel* case that South Carolina was entitled to call the funeral insurance business an evil, and that the statute banning it had a relation to the elimination of the evil. But the present appeal does not involve funeral insurance or undertakers or any facts comparable to the situation in the *Daniel* case. The *Daniel* case, therefore, does not affect the substantialness of the question presented by the instant appeal.

The appellees at page 3 of their motion also quote language from the *Daniel* case regarding the pronounced shift of emphasis in the view of this Court which has deprived the words "unreasonable" and "arbitrary" of the content which formerly was accorded them. The appellants, however, are well aware of this change in the view-point of this Court. It was for this reason that the appellants in their jurisdictional statement relied on language from *Nebbia* v. *New York*, 291 U. S. 502 (1934), rather than on the case of *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928), in connection with the due process requirement that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

A good statement of the current due process philosophy

of this Court is contained in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949), where Mr. Justice Black, in delivering the opinion of the Court, stated:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia* v. *New York, supra,* and *West Coast Hotel Co.* v. *Parrish, supra,* and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." (335 U. S. at 536-7.)

Thus, while the recent decisions of this Court "leave debatable issues as respects business, economic, and social affairs to legislative decisions," *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 425 (1952), such decisions do not repudiate the principle that the guaranty of due process demands that a "law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." See *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

A further indication that the guaranties of the Fourteenth Amendment are still applicable to state regulation under the police power is found in the recent case of *Morey* v. *Doud,* 354 U. S. 457 (1957). In that case the Court held that the Illinois Currency Exchanges Act, which excepted

the American Express Company from its operation, resulted in a denial of equal protection of the laws to those who were subjected to the requirements of the Act. The Court found that the statutory classification was arbitrary and had only a remote relationship to the Act's purposes or to business characteristics. While the case did not involve the due process clause, it does demonstrate that a state legislature can still transcend the limits of the Constitution in purporting to legislate for the public welfare.

The appellees contend on page 6 of their motion that pre-need selling of personal property, merchandise and services in connection with the final disposition of head human bodies is so precarious a venture that the State of Illinois might have categorically prohibited the enterprise as one in which the appellants have no constitutional right to engage at all. The appellants, however, submit that the record on the instant appeal contains no facts which would entitle Illinois to call pre-need selling an evil. On the contrary, an explication of the facts in the record, and of which the court may take judicial notice, would demonstrate that pre-need selling of merchandise and services for use in connection with the final disposition of dead human bodies is a positive good and serves a real public need.

Not only does the record not contain any evidence which would support a legislative ban on pre-need selling, but the statute itself does not purport to ban such activity but only to regulate the manner in which it can be conducted. The apparent legislative purpose in enacting the challenged statute was not to prohibit pre-need selling but rather to provide safeguards for the purchasers. However, the means which the legislature selected to accomplish this end utterly fail to safeguard such purchasers against fraud, deceit, cheating and imposition. See pages 15-19 of the jurisdictional statement. For example, the statute in

question does not deal in terms of costs of performance. Since sales of burial lots, markers and memorials are not covered by the statute, the statute can be effectively circumvented by tying a sale of a burial vault to a sale of a burial lot or marker and charging an inflated price for the lot or marker and a nominal price for the vault. If the seller then places the proceeds from the sale of the vault in trust, he has fully complied with the challenged statute, although the money deposited in the trust would not be sufficient to complete the contract when the time for performance arrives.

The challenged statute was designed to hit directly at the appellants' way of doing business and at its form of contract. The appellants' way of doing business and form of contract were formulated with a view of giving the purchasers a maximum of assurance that the merchandise and services sold will be delivered when the time for performance arrives. What the statute actually accomplishes is to drive the appellants and other honest and responsible sellers out of the business of pre-need selling of burial merchandise and services, but the way is left open for unscrupulous sellers to practice fraud and deception on unsuspecting purchasers. The statute is manifestly unreasonable, arbitrary and capricious in its operation, and the means which it employs have no real or substantial relation tc the object sought to be attained.

The present appeal does not call upon the Court to "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare," *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952), but presents a justiciable question which can be resolved by the application of rational standards. See Mr. Justice Frankfurter concurring in *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 542 (1949), at page 557.

Under no view of the record can it be said that the question presented by this appeal is not substantial. It is substantial because it has not been foreclosed by prior decisions of this Court, and because there is a conflict of decisions among the state courts of last resort which have considered it, as shown at pages 10-11 of the jurisdictional statement.

Conclusion.

For the foregoing reasons and the reasons contained in the jurisdictional statement, the appellees' motion to affirm the judgment appealed from should be denied, and the Court should note probable jurisdiction.

Respectfully submitted,

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